

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1372

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee,

vs.

FMC CORPORATION,
Defendant-Appellant.

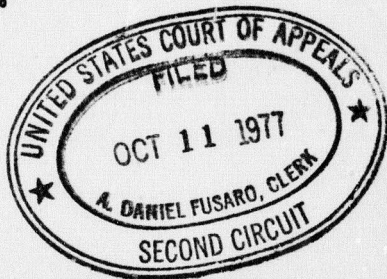
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

BRIEF OF THE APPELLANT

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UNITED STATES OF AMERICA,

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vs.

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Defendant-Appellant.

BRIEF OF THE APPELLANT

Issues for Review

In a prosecution under the Migratory Bird Treaty Act, 16 U.S.C. § 703, was it error for the Court below to refuse to charge that intent to harm birds was necessary, to refuse to charge that accidental killing was a defense, and to charge that no element of scienter or equivalent culpability was required?

Statement of the Case

Introduction

This is an appeal from a Judgment of Conviction (16) in the United States District Court, Western District of New York. The 36-count Indictment (7-9) charged defendant with killing

92 migratory birds in violation of 16 U.S.C. § 703¹ between April 23 and June 25, 1975 at its facility in Middleport, New York "by means of toxic and noxious waters". After a trial by jury² before Chief Judge Curtin, a Verdict (14-15) of guilty on 18 separate counts totalling 23 birds was returned. Defendant was fined \$100 on each of the 18 counts but the fine was remitted on all but five counts (16).

Defendant's Middleport Plant

In Middleport, New York, defendant manufactures and formulates various pesticides (93). Included among those are two types of carbomates: carbofuran (sold by defendant under the trade-name of "Furadan") and dithiocarbamates (148-49). Carbofuran is primarily used on corn for the control of root-

¹ "Unless and except as permitted by regulations made as hereinafter provided in sections 703 to 711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer ~~for sale~~, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972."

² Judge Curtin had previously granted defendant's motion for a jury trial because of the size of the potential penalty. His decision is reported in *United States vs. FMC Corp.*, 428 F. Supp. 615 (1977).

worms and other insects (148). The Government's wildlife pathologist identified two other generic groups of pesticides which could be used for the same purposes (organophosphates and chlorinated hydrocarbons—314-15) and indicated that, of the three, carbamates were the safest because of documented human mortality from organophosphate poisoning (314) and the Environmental Protection Agency's restrictions on the use of chlorinated hydrocarbons (308). Nevertheless, he testified that pesticides "are essential in the modern world" because without them "we would not be able to feed much of the world and we would not be able to feed ourselves" (316).

Carbofuran was manufactured by defendant in Building No. 70, referred to as the "carbofuran plant" (214), and was produced with minimum amounts of wastewater (225). On the other hand, there were large amounts of waste water associated with the separate dithiocarbamate plant (171). The dithiocarbamate waste water, after filtration, was pumped into a small holding pond after which it was pumped into the larger lagoon (171). The large lagoon covered an area of approximately ten acres and held 12,000,000 gallons of water (184). Jeddo Creek, a tributary of Johnson Creek, acted as the receiving waters for the lagoon (201). The purpose of the lagoon was to permit staged discharge to Jeddo Creek at those times of the year when the creek flow was high enough so there would be a sufficient dilution factor to prevent fish kills (172).

The manner in which the plant was operated was such that carbofuran, as opposed to the dithiocarbamates, should not have been present in the lagoon. The very small amount of carbofuran which escaped the manufacturing process was vacuumed up, after which the area was washed down with

water (150). The washdown water was collected in a caustic sump where it was treated with sodium hydroxide to raise the pH of the sump water so as to cause the chemical decomposition of carbofuran into harmless materials (150-1). At pH-10 the dissolved carbofuran is decomposed rapidly and at pH-12 decomposition is "faster, probably a hundred times as fast" (151). The procedure was to obtain a minimum of pH-10 before pumping the sump to the pipe which ran from the small pond to the large lagoon (151; Exhibit 1). Company logbooks demonstrated that the desired pumpout at pH-10 was maintained (158-60). When the high pH water from the sump mixed in the lagoon with the huge amount of waste waters from the dithiocarbamate plant, the resultant pH in the lagoon was low; the dithiocarbamate waste water included ammonium sulfate which, when the pH is above 7, is toxic to fish (171).

Discovery of Dead Birds

Prior to the Spring of 1975, there was no previous experience with birds dying in the vicinity of its lagoon. Defendant's warehouse supervisor, a life-long resident of Middleport, whose responsibilities included supervision of the groundskeepers, so testified (331-5). He first learned of bird deaths near the lagoon when, in the Spring of 1975, it was reported to him (334). No previous bird kill had been reported to him (333). The plant manager, William C. Cole, Jr., who assumed his duties in Middleport on September 1, 1974 (336), also had no bird deaths reported to him and knew of none until the Spring of 1975 (335-6).

In April of 1975, defendant's Technical Manager discovered five dead birds in the water of the lagoon (163). On April 23, he requested the supervisor of the groundskeepers to have them removed (164). The groundskeeper

picked up 26 dead geese and seven to nine dead ducks (142). Mr. Cole was informed of the dead birds on April 25 (184-5). On that day and before Mr. Cole could take any action, representatives of the New York State Department of Environmental Conservation visited the plant in response to a report of dead birds (185).

Defendant's Remedial Measures

Upon discovery of the large bird kill, defendant instituted various measures to keep the birds away from the lagoon where they were dying. The first step taken, between April 25 and May 15, 1975, was the installation of 50 to 100 styrofoam floats (186) designed hopefully to frighten the birds (65-6).

On May 15, 1975, upon the occasion of the first visit to the plant by United States Fish and Wildlife Agent Lisenbee, the agent suggested that "Zon" guns (propane cannon devices) might act as an effective repellent (75). After some difficulty in attempting to locate them, they were purchased and installed on May 21 (187). Because of the noise made by the guns, Mr. Cole received citizen complaints and threatened lawsuits requiring that they be shut off in the evenings and on Sunday mornings and that they be repositioned so as to muffle the sound (187-90).

Agent Lisenbee also suggested that shotguns, loaded with cracker shells (loud-sounding blank cartridges), be acquired to scare birds away (75). By June 13, 1975, defendant had employed a fulltime guard service to patrol the lagoon with these devices (190). The guards which were first employed apparently did not take the job seriously and it took some time to find conscientious people to handle the patrols (190-91).

The Fish and Wildlife Agent also suggested the use of "Avalarms" (75). While he was unable to identify any brand

name for these devices, defendant eventually purchased the specific system in late June (217-18). The Avalarm electronically creates a high-pitched sound simulating the distress call of birds so as to scare landing birds away (81). At least four were purchased (81).

While the Government recommended that the lagoon be netted (75), Agent Lisenbee had no previous experience with netting ponds, was not aware of the commercial availability of the nets and made no suggestions as to where they could be obtained (82). Notwithstanding these uncertainties, defendant obtained a net and commenced physical erection in late July (219). The net came in 3,000 yard rolls and was placed upon steel cable stretched across steel posts anchored in the lagoon on tripods forming 50 foot intersections throughout the ten acre area (220). The installation employed the use of between ten and twenty people (221). The net was damaged by the wind (221) and did not survive either the winter of 1975-76 or 1976-77 (221-2).

By late May of 1975, the State's wildlife pathologist was of the opinion that carbofuran was the source of the bird toxin (209). The only source of carbofuran would be from the plant where it was manufactured rather than from the dithiocarbamate process (214). With the realization that carbofuran existed in the pond, defendant analyzed the sump and diagnosed the problem as relating to the amount of carbofuran in the sump and the frequency with which it was pumped into the pipe leading to the lagoon. The sump had not been analyzed earlier because there was no reason to suspect carbofuran existed in the lagoon; it was supposedly being destroyed in the sump (199). Nor did the fact of a previous fish kill in October 1974 lead to the possible presence of carbofuran; the fish kill had been attributed to ammonia from

the dithiocarbamate process by the DEC and by defendant (200). When the problem with the sump was discovered, a filter was installed thereon (215) and it was eventually phased out completely and replaced with a carbon-treatment system (215-16), but as to the carbofuran already in the lagoon the prospect of more bird deaths continued. Based on the chemistry involved, defendant elected to treat the lagoon waters in much the same way that the sump water had been treated, but on a much larger scale; vast quantities of sodium hydroxide were added to the lagoon to attempt to raise the pH to decompose the carbofuran (222). Direct addition of caustic to the pond commenced in July (223). By the time it had finished, ten truck loads or 4.5 million pounds of caustic had been added (224).

The ultimate solution to the possibility that the lagoon could cause bird deaths was carried out in 1977 when it was plowed under and eliminated, defendant having, by that time, constructed a complete and integrated waste water treatment facility at a cost of approximately \$4,000,000 (203).

Defendant tried everything that was suggested to it by the Government to attempt to save birds from death (82). At all times it cooperated with the Government in investigating the deaths, their potential causes and the attempt to alleviate them (74, 75, 85, 94). Defendant continued to cooperate even after it was advised, on May 15, that there were possible criminal penalties involved (31); it even sent test results to the Assistant U.S. Attorney in charge of the investigation (371).

The Cause of Deaths

Using hindsight, defendant ascertained that the increased levels of carbofuran in the lagoon resulted from increased

washdown procedures in the carbofuran plant. It reported this to the Environmental Protection Agency in a letter of July 7, 1975 (Exhibit 15; 372-5). The findings were summarized as follows (373):

"In our carbofuran department any spills must be cleaned up immediately because of the toxic nature of the material. Dry spills are usually vacuumed first and then washed down with water. The water goes into a sump, where caustic is added to destroy the carbofuran. When the sump is filled, it is pumped to the wastewater holding lagoon.

"Our research studies showed that this method of treatment is effective in chemically degrading the carbofuran to relatively non-toxic breakdown products. However, over the last few months, increased emphasis on reducing personnel exposure has led to a large increase in wash down frequency. This increase meant that contact time with the caustic and apparently hydrolysis was incomplete before the sump material was pumped to the pond. Accordingly, the concentration of carbofuran in the waste water lagoon gradually built up to the toxic level."

Mr. Cole testified that sufficient exposure of employees to spilled carbofuran cause them to become "very sick" (204). The greater frequency of washdowns was implemented in the Fall of 1974 and increased over a period of months (204-5). The decrease in carbofuran-exposure illnesses has been dramatic since that time: there were 150 illnesses in 1974, 69 in 1975, 29 in 1976 and 6 up to the time of trial in 1977 (205-6).

The Court's Charge and Refusals to Charge

Defendants submitted three specific requests to charge on the issue of intent (10). The first and third merit repetition:

"1. Before you may convict the defendant of killing birds in violation of the statute, you must also find that defendant intended to cause harm to the birds. The burden of proof is on the prosecution to so show such intent.

* * *

"3. If you find that the birds died as a result of an accident, you must acquit defendant."

The Court refused to charge these requests (340).

On the other hand, what the Court did charge took from the jury any issue of intent. Judge Curtin charged that the statute created a public welfare offense which "dispenses with the conventional requirement for criminal conduct; namely, awareness of wrongdoing and the specific intent to violate the law" (358). He charged that "good will and good intention and measures taken to prevent the killing of birds are not a defense", and that "if you find that the birds were killed by the products emitted from the FMC plant then you must return a verdict of guilty" (359-60). He specifically charged that the Government did not have to prove that "defendant intended to kill the birds. You may convict the corporation even if you find that the killing of the birds was accidental or unintentional" (360-1). Objections to those portions of the charge were made (363-5).

The jury was obviously troubled by the intent issue. It returned during its deliberations with the following question: "In charging the law some jurors were not clear as to whether or not FMC must be convicted whether or not polluting was intentional or accidental" (369). Judge Curtin, in response, emphasized that an intent to pump carbofuran into the lagoon was unnecessary (369-70).

ARGUMENT

The Court should have charged that intent to harm birds was necessary for conviction and that accidental killing was a defense; it should not have charged that awareness of wrongdoing was unnecessary.

1. Summary

To the knowledge of the undersigned, this case involves questions under the Migratory Bird Treaty Act (the "Bird Act") never before decided by a Court of Appeals.³ The issue raised is fundamental; as stated by Justice Jackson in *Morissette vs. United States*, 342 U.S. 246, 250 (1952): "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."

Traditional definitions of crime include two basic elements: a union of act and intent. As stated in *Morissette*, at common law it was necessary for there to be a "concurrence of an evil-meaning mind with an evil-doing hand." 342 U.S. at 251. Defendant contends that the Court below took both elements from the consideration of the jury. The law of this case, as charged in the District Court, requires neither the purposeful commission of the statutorily prohibited act (killing of migratory birds) nor the culpable knowledge of the defendant.

³ Research has disclosed only one other case (not officially reported) where similar issues were discussed. *United States vs. Union Texas Petroleum*, CR-73-127 (D. Colo. 1973). As Judge Curtin noted, since that case never went to trial, "the issue has never been adjudicated." *United States vs. FMC Corp.*, *supra*, 428 F. Supp. at 617.

2. The Act

While Courts and commentators frequently focus entirely on the *mens rea* aspect of crime where intent is in issue, it is important to recognize that intent is also a necessary element involved in a statutorily condemned act. Even in those classes of cases where *mens rea* is eliminated by virtue of the express or implied intent of the legislature, there still must be a volitional prohibited act by defendant for there to be a conviction. Mueller, "On Common Law Mens Rea" 42 Minn. L. Rev. 1043, 1052 (1958).

The statute in question, 16 U.S.C. § 703, provides in pertinent part:

" . . . it shall be unlawful at any time by any means or in any manner, to . . . kill, attempt to . . . kill . . . any migratory bird . . . "

Even if the Court below was correct that killing of migratory birds need not be accompanied by knowledgeable violation of the law, the use of the word "kill" by Congress compels the conclusion that there must be, at the very least, an intent to harm birds by defendant culminating in their death for there to be a conviction. Any other position may lead to the criminal prosecution for bird deaths, where, under similar circumstances, the killing of humans would not be indictable; for example, Judge Curtin specifically charged that accidental killing of birds was no defense (360-61).

That the word "kill" imports an intentional act aimed at harming birds is further indicated by the statutory language making it unlawful to "attempt" to kill birds. There can be no such thing as a nonpurposeful "attempt" since an attempt must be accompanied by volition. Mathes & Devitt, *Federal Jury Practice and Instructions, Civil and Criminal* (1965)

§ 15.14. Had Congress intended non-volitional killing to be criminal it could have easily so provided by eliminating references to attempted killing and by employing words of passive conduct such as "permitting" birds to die or "suffering" their deaths.

The position that a statutorily prohibited act requires an intent to do that act, apart from any question of *mens rea*, is not a novel concept. In *United States vs. Sawyer*, 294 F.2d 24 (4th Cir. 1961) *cert. den.* 368 U.S. 916 (1961), the Court defined what was necessary for a successful prosecution under 26 U.S.C. § 5686(a) as being "(1) possession of the property [the act], and (2) intention that the property is to be used in violation of any provision of chapter 51 of Title 26 U.S.C. [the intent to violate the law]." Concerning the first element, the Court stated (294 F.2d at 29):

" 'Possession' means the act or state of possessing and may be either actual or constructive. Ownership is not an essential element of 'possession'. However, possession, when charged as a crime, must be conscious." (Emphasis added.)

Similarly, in *United States vs. Freed*, 401 U.S. 601 (1971) *reh. den.* 403 U.S. 912 (1971), a prosecution for the unlawful possession of unregistered handgrenades under 26 U.S.C. § 5861 (d),⁴ the Supreme Court held that "the only knowledge required to be proved was knowledge that the instrument possessed was a firearm." 41 U.S. at 607. Accord: *Hornstein vs. Paramount Pictures*, 37 N.Y.S.2d 404 (1942), *aff'd* 266 App. Div. 659 (1st Dept. 1943), *aff'd* 292 N.Y. 468 (1944), where the trial Court said (37 N.Y.S.2d at 413): "The word 'give' [in a

⁴ "It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him under the National Firearms Registration and Transfer Record . . ."

bribery statute] connotes voluntary action, and to construe the statute as including involuntary payments would run counter to the most fundamental conception of criminal liability and justice."

By the same token, the prohibited act under the Bird Act is killing and the use of the word "kill" connotes voluntary killing. Judge Curtin's charge to the contrary violates the "fundamental conception of criminal liability and justice" that concerned the *Hornstein* Court.

Cases which hold that *mens rea* is not required under a statute frequently justify their holding upon the finding that the statute is *malum prohibitum*. See, for example, *United States vs. Reese*, 27 F. Supp. 833 (D.C. Tenn. 1939). The holding in *Reese*, however, like the other holdings dealing with scienter under the Bird Act, is inapplicable to the present case because they involved situations (hunting) where the intent to kill birds was self-evident. But, for the sake of argument, accepting the conclusion in *Reese* that the statute is *malum prohibitum* (27 F. Supp. at 835), there can still be no justification for the charge and refusals to charge of the District Court.

Offenses which are *malum prohibitum* still require an intent to commit the prohibited act notwithstanding an absence of scienter. In *People vs. Munoz*, 9 N.Y. 2d 51, 58 (1960), it was said:

"Crimes may be created without intent as a factor *other than an intent to commit the prohibited act* . . . , but there must be some reasonable relationship between the public safety, health, morals or welfare and the act prohibited . . ." (Emphasis added.)

Ergo, absent "an intent to commit the prohibited act," even if there is some reasonable relationship between the public

safety, health, morals or welfare and the killing of birds, no crime has been committed. Similarly, see: *People vs. Persce*, 204 N.Y. 397, 401-2 (1912):

"The legislature has the undoubted power to declare that various acts, not theretofore so, shall be criminal without proof of other intent as a necessary ingredient of the offense than the intent to commit the prohibited act

...
 "If we give to the statute under consideration a rational interpretation it becomes clear that the carrying or possessing of a slungshot even without proof of specific ulterior criminal intent are within the character of acts which the legislature must thus condemn. Of course, the possession which is meant is a knowing and voluntary one, as the trial judge explicitly charged."

People vs. Anderson, 210 App. Div 59, 72 (1st Dept. 1924), *aff'd* 239 N.Y. 534 (1924):

"Crimes *mala prohibita*, which statutory regulations create, have reference to the act alone and its conscious as distinguished from its inadvertent performance."

Gardner vs. People, 62 N.Y. 299, 304 (1875):

"The rule on the subject appears to be, that in acts *mala in se*, the intent governs, but in those *mala prohibita*, the only inquiry is "has the law been violated?" (3 Den., 403.) The act prohibited must be intentionally done. A mistake as to the fact of doing the act will excuse the party, but if the act is intentionally done, the statute declares it a misdemeanor, irrespective of the motive or intent."

This Court has expressed similar sentiments, inferentially, in *United States vs. Ricciardi*, 357 F.2d 91 (2d Cir. 1966) *cert. den.* 384 U.S. 942 (1966); and *United States vs. Winston*, F.2d (2d Cir. 6/23/77) (CCH Labor Cs. ¶ 13,309).

In *Ricciardi, supra*, defendant Unger was convicted under 29 U.S.C. § 186 which made it unlawful "to request, demand, receive, or accept" money from an employer as a union representative for the employees. The Court below charged that "conscious wrong-doing" was not a constituent element of the crime. This Court affirmed but stated (357 F.2d at 100):

"Nor did the trial court err in failing to give Unger's requested charge that the jury must find Unger not guilty unless they find that Unger knew he was violating the law or acted in reckless disregard of the requirement of the law. The trial court in *United States v. Ryan* held that it was enough if the employee representative received money 'with knowledge (1) that he was receiving or accepting money, and (2) that the person who was giving him the money was an employer of employees that he represented' . . . The Supreme Court indicated that the statute was 'a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative.' 350 U.S. at 305, . . ."

In *Winston, supra*, Judge VanGraafeiland, citing *Ricciardi* as authority, stated: "Although Congress has in *malum prohibitum* offenses, sometimes equated willfulness with purposefulness and awareness, as distinguished from negligence or inadvertence, . . . we are satisfied that such was not its intention in this instance." The Court went on to hold that the traditional elements of *mens rea* were required for a conviction under the Railway Labor Act, 45 U.S.C. § 152.

In *State vs. American Agr. Chemical Co.*, 110 S.E. 800 (Sup. Ct. S.C. 1922) defendant, a corporation which manufactured fertilizer, was convicted under a statute making it criminal to "cause to flow into or be cast" into an inland stream a substance poisonous to fish. Defendant had been using stream water to wash out its acid tanks and when the tanks overflowed, fish deaths occurred. There had been at least one

previous prosecution in respect to a similar incident which resulted in a mistrial. The Court noted that there was "abundant evidence tending to show" that the acid from defendant's plant had been destructive to fish life. Defendant's contention was that the escape of the acid was accidental and "without negligence or design on its part, and does not constitute a crime". The trial judge refused to charge that intent was required under the statute. The Supreme Court of South Carolina reversed.

Even though the case involved a statutory offense (where, the Court said, "the state is not required to prove a criminal intent"—110 S.E. at 802), the Court quite clearly held that a volitional act was a predicate to conviction. It stated (*Id.*):

"In the statutory offenses which the state is not required to prove a criminal intent on the part of the accused it is assumed, as fully appears, that the act was one of volition, and the defense that he did not intend to commit an unlawful act is not open to him.

"If one should do an act intentionally, the act is the result of his personal volition; and if it should be an act prohibited by statute, he will not be heard to say that he did not intend to commit a crime in so doing. But, if it occurred by accident, his volition could not have preceded the act, and both the intention to do the act and the intention to commit a crime are necessarily absent. *To constitute a crime the personal volition or negligence of the actor preceding the act is essential.*" (Emphasis added.)

See also, 21 *Am. Jur.* 2d "Criminal Law" § 81 p. 163; 22 *C.J.S.* "Criminal Law" § 30 p. 107, Mueller, *supra*, 42 *Minn. L. Rev.* at 1059 (nt. 47):

"Where the criminal statute is one of absolute liability, the mens rea requirement has been dispensed with. To say that not even an act (*i.e.*, the mental process part

thereof) is required, would be the acme of absurdity. Such cases, however, are not unheard of precisely for the reason that the entire mental element of crime has been treated as a unity, under *mens rea*, in flagrant disregard of the fact that the mental process aspect of an act is something entirely distinct from a *mens rea*."

The Government argued in the District Court that the absence of language specifying the necessity of intent in the Bird Act rendered intent of any kind unnecessary. As authority the Government cited the Bald Eagle Protection Act, 16 U.S.C. § 668 ("Eagle Act"), which, after a 1972 amendment, provides in part:

"Whoever . . . shall knowingly, or with wanton disregard for the consequences of his act take, . . . at any time or in any manner, any bald eagle . . . shall be fined not more than \$5,000 or imprisoned not more than one year or both."

Section 668c defines "take" to include "kill", among other things. The Government's argument was that § 668 requires less than traditional criminal intent and, because of the harsher penalties for killing eagles, the failure to amend the Bird Act evidenced Congressional purpose that intent to harm birds is not required under § 703.

Quite the contrary, the history pertaining to the 1972 amendment to the Eagle Act proves that Congress recognized that such intent is necessary. Prior to 1972, § 668 read in part:

"Whoever . . . shall take, . . . at any time or in any manner, any bald eagle, shall be fined not more than \$500 or imprisoned not more than six months or both . . ."

Thus, both the language and the penalties of the Eagle Act paralleled the language and penalties of the Bird Act. The

amendment was necessitated because of highly publicized eagle deaths in Wyoming. Twenty-one of the deaths resulted from exposure to thallium sulfate, a highly toxic poison used by farmers to bait sheep and antelope carcasses for coyote control. The poisoned carcasses killed the eagles as well as other nontarget species. In *Hearings before the Sub-Committee on Agriculture, Environmental, and Consumer Protection of the Senate Committee on Appropriations for "Predator Control and Related Problems"* (92d Cong. 1st Sess.) the following exchange occurred between Chairman McGee and Administrator Ruckelshaus of the Environmental Protection Agency (6/2/71 p. 11):

"Senator McGee. I gather it would have to be pinned down tightly to the mere possession or application of thallium, let us say, to a carcass, rather than as to the intent?

"One of the blind spots I am told that it is difficult, for prosecution purposes, to prove that somebody put thallium in a carcass in order to get the eagles and therefore merely the use of the thallium would become the crime?

"Mr. Ruckelshaus. That is exactly right. That is precisely what our bill is aimed at . . ."

The Chief of the Division of Management and Enforcement, Bureau of Sport Fisheries and Wildlife, Department of Interior stated (p. 44):

"From the standpoint of prosecution, it is extremely difficult for the reason I must of necessity prove that these antelope were the ones that these eagles over here fed on and that the man over here that put them out did so intentionally to kill eagles."

* * *

"... we have no evidence, sir, that anyone was deliberately attempting to kill these eagles."

Russell E. Train, the Chairman of the Council on Environmental Quality put it more succinctly (6/3/71 p. 112):

"First, let us examine the present legal protection of the eagles. The Bald Eagle Protection Act . . . prohibits the taking of bald and golden eagles within the United States. 'Taking' is defined as including wounding, killing, pursuing, or otherwise willfully molesting or disturbing the eagles.

"The weakness illustrated by the present situation lies in the requirement to prove intent. It would be difficult to prove that a poisoned bait was intended specifically for the eagles, when there may be a wide spectrum of bird and mammal carnivores and scavengers which could take the bait and for which it could be claimed that the poison was intended."

Therefore, the only thing that the 1972 amendments to the Eagle Act proved is that the Government, at that time, conceded that without the additional language a specific intent to kill eagles was necessary for prosecution. The language of the pre-1972 Eagle Act is so close to the Bird Act that a similar conclusion follows inexorably with respect to § 703. The Government's argument to the contrary was erroneous.

From all of the evidence submitted, intent to do the prohibited act of killing was totally absent. The Government proved that birds died because of carbofuran in the lagoon (296). The lagoon was never intended for treatment of carbofuran (176, 199) and its presence in the lagoon occurred inadvertently and only because of the defendant's concern for its workers' health (204-6). Not only is there an absence of intent to harm birds, the record is also devoid of any proof of knowledge that birds were exposed to carbofuran. The

operating procedures of defendant's plant contemplated the chemical destruction of carbofuran before it reached the lagoon (150).

By construing the Bird Act so as to eliminate the fundamental requirement of intent to commit the prohibited act, the District Court has taken a statute, plain and understandable on its face, and rendered it vague in such a fashion that a defendant is unable to ascertain whether his conduct may violate the statute. *Bouie vs. Columbia*, 378 U.S. 347 (1963). Thus, under the charge delivered by the Court below, potential criminal responsibility exists for the farmer who killed migratory birds while spreading manure (301), for a driver who kills them with his automobile (one hundred such "violations" occur every day in Columbia County, New York—242), for an airline or pilot whose planes kill birds (241-2), for power companies whose high-tension wires electrocute them (241) and for the owners of buildings which are the ultimate cause of death to birds (241). Indeed, automobiles, buildings and airplanes are, according to the Government's expert ornithologist, the "principal offenders" (243). The only way for such uncertainty to be eliminated is for this Court to adhere to the premise that there must be an intent to do harm to birds for a conviction to stand.

3. *Mens Rea*

The District Court's refusal to charge that accidental killing was a defense also raises the issue of whether *mens rea* is required for conviction under the Bird Act. Error in this regard was compounded when Judge Curtin charged that the Bird Act dispensed with the need to show "awareness of wrongdoing and the specific intent to violate the law" (358).

The leading case on the subject of *mens rea* under Federal criminal statutes is *Morissette vs. United States*, 342 U.S. 246

(1952). There, defendant was convicted under 18 U.S.C. § 641 which provided that whoever "embezzles, steals, purloins, or knowingly converts" government property shall be fined, if the property does not exceed the value of \$100, not more than \$1,000 or imprisoned for more than one year. Mr. Morissette took from Government land spent bomb casings which he believed to be abandoned. Upon investigation, he voluntarily and candidly told the whole story of his taking and his belief that the property had been his to take. The value of the property was alleged to be \$84.00 and he was convicted and sentenced to two months' imprisonment and a \$200 fine. The trial court correctly charged the requisite intent necessary for the taking ("The question on intent is whether or not he intended to take the property"—342 U.S. at 249), but refused to permit defendant to show that he thought the property was abandoned. Thus, the issue of *mens rea*, as opposed to the intent to do the prohibited act, was squarely presented for review. In reversing, Justice Jackson extensively discussed the traditional *mens rea* element and those cases in which it could be eliminated based upon legislative intent; he found that § 641 required traditional *mens rea*.

He traced the development of the "ancient requirement of a culpable state of mind" (342 U.S. at 250) and the relatively few common law exceptions such as sex offenses. Statutory exceptions, consisting of what came to be known as "public welfare offenses",⁵ were, according to Justice Jackson, the normal development of the industrial revolution (*Id.* at 253). Some examples he gave were traffic ordinances, tenement house regulations, sales of alcohol to habitual drunkards and sales of adulterated foods (*Id.* at 254). The characteristics of these offenses were that they are "not in the nature of positive

⁵ See Sayre, "Public Welfare Offenses", 33 *Colum. L. Rev.* 55 (1933).

aggressions or invasions . . . but are in the nature of neglect where the law requires care, or inaction where it imposes a duty" (*Id.* at 255-6); that violation of them do not result in direct or immediate injury to person or property but merely create a danger or probability of it which the law seeks to lessen; and that the penalties for violation are "relatively small, and conviction does no grave damage to an offender's reputation" (*Id.* at 256). The justification for the creation of these offenses is based upon the convenience of prosecution (*Id.* at 253) and that the penalty is an effective means of regulation (*Id.* at 259-60).

The failure of Congress to mention any element of intent was not considered by the Court to be dispositive. The absence of such language from § 641 and the reversal makes that conclusion obvious.

The Court also recognized that the nature of the prohibited offense may bear upon the conclusion that the legislative intended to eliminate *mens rea*. It referred to *United States vs. Balint*, 258 U.S. 250 (1921) and *United States vs. Behrman*, 258 U.S. 280 (1921), narcotics cases, and *United States vs. Dotterweich*, 320 U.S. 277 (1943), an adulterated food case, in this category. "The conclusion reached in the *Balint* and *Behrman* Cases has our approval and adherence to the circumstances to which it was there applied" 342 U.S. at 260.

In charging that the Bird Act created a public welfare offense, Judge Curtin undoubtedly based his conclusion upon the many cases under the Bird Act where the courts have said that "scienter" was not required.⁶ The *Morissette* Court

⁶ *United States vs. Schultze*, 28 F. Supp. 234 (W.D. Ky. 1939); *Rogers vs. United States*, 367 F.2d 998 (8th Cir. 1966) cert. den. 386 U.S. 943 (1967); *United States vs. Jarman*, 491 F.2d 764 (4th Cir. 1973); *United States vs.*

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equated scienter denoting guilty knowledge and *mens rea* signifying evil purpose or mental culpability (342 U.S. at 252).

It is unnecessary for this Court to disregard the hunting precedents. In limited count informations or indictments of hunters, a requirement of scienter could conceivably frustrate the intent of Congress to protect birds from persons who intend their destruction. As stated in *Balint* (258 U.S. at 251-2):

"While the general rule in common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes, even where the statutory definition did not in terms include it . . . , there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent, to be construed by the court."

Defendant contends that Congress never intended the Bird Act to control or regulate the manufacture of pesticides or, for that matter, any of the myriad other ways in which birds are accidentally killed. While the hunter knows he is engaged in an activity likely to be the subject of legislation and therefore chargeable with knowledge of the law, that situation does not prevail as to those who are engaged in otherwise lawful pursuits. In this latter situation the intent of Congress is in no way frustrated by requiring scienter or *mens rea*.

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Ireland, 493 F.2d 1208 (4th Cir. 1973); *United States vs. Bryson*, 414 F. Supp. 1068 (D. Del. 1976); *United States vs. Tarmon*, 227 F. Supp. 480 (D. Md. 1964); and *United States vs. Wood*, 437 F.2d 91 (9th Cir. 1971). Cf. *Allen vs. Merovka*, 382 F.2d 589 (10th Cir. 1967) where the Court expressly refused to follow *Schultze*, saying: "The acts of third parties totally independent of the acts of hunting should not be used to make illegal what otherwise is proper". (382 F.2d at 591).

The Bird Act was enacted on July 3, 1918 (Ch. 128, § 2, 40 Stat. 755) to implement the convention entered into between the United States and Great Britain in 1916. The Act was later amended in 1936 and 1974 to give effect to the conventions with Mexico (1936) and Japan (1972). The clear and unmistakable purpose of this legislation was to protect migratory birds from slaughter at the hands of the hunter:

Introduction to the Convention with Great Britain, August 16, 1916 (30 Stat. 1702):

"[B]eing desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless. . . ."

Convention with Mexico, February 7, 1936 (50 Stat. 1311):

Article II

"The high contracting parties agree to establish laws, regulations and provisions to satisfy the need set forth in the preceding Article, including:

A) The establishment of *close seasons*, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding, with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums.

B) The establishment of refuge zones in which the taking of such birds will be prohibited.

C) The *limitation of their hunting* to four months in each year, as a maximum, under permits issued by the respective authorities in each case.

D) The *establishment of a close season* for wild ducks from the tenth of March to the first of September.

E) The prohibition of the killing of migratory insectivorous birds, except when they become injurious to agriculture and constitute plagues, as well as when they come from reserves or game farms: provided however that such birds may be captured alive and used in conformity with the laws of each contracting country.

F) The *prohibition of hunting from aircraft.*" (Emphasis added.)

155 Cong. Rec. 7360 (1918) (remarks of Rep. Anthony):

"For instance, in my home State of Kansas the great semi-annual flocks of wild ducks and wild geese that 25 years ago used to pass over our State in their annual migrations have perceptibly diminished year by year as a result of merciless slaughter, especially during the spring breeding season."

Similarly, when the Congress considered increasing the penalties for violations of the Bird Act, the purpose of the legislation was noted in H. R. Rep. No. 1787, 86th Cong., 2d Sess. 1 (1960):

"The purpose of the bill is to authorize more severe penalties for persons who engage in the killing of migratory birds for sale. *Under the present law, the individual who hunts for pleasure* and who takes one more bird than the bag limit or who hunts a few minutes before sunrise or after sunset is liable to the same penalties as the man who makes a career of slaughtering wildfowl for market." (Emphasis added.)

These pronouncements evidence a clear and unequivocal legislative intent to proscribe the behavior of the hunter—one who intentionally kills migratory birds. Courts have recognized that intent. *Allen vs. Merovka*, 382 F.2d 589, 591 (10th Cir. 1967); *United States vs. Olson*, 41 F. Supp. 433, 434 (W.D. Ky. 1941); *United States vs. FMC Corp.*, *supra*, 428 F. Supp. at 617. Nowhere in the legislative documents is there

any evidence that the Bird Act was intended to impose strict criminal liability on anyone who might accidentally or inadvertently kill a migratory bird.

The Government argued below that Congress intended to protect birds no matter how they were killed and cited the portions of the legislative history which refer to the aesthetic value of birds and their necessity as sources of food and for insect control. It also relied on the language of § 703 prohibiting killing "by any means or in any manner." Language praising the benefits of birds would naturally be expected in support of any legislation designed to prohibit bird deaths by hunting. To argue from that language that Congress intended some sort of pesticide regulation would just as easily lead to the conclusion that it intended to regulate traffic, construction projects and airplanes (243) or agricultural manure practice (301). The only conceivable language containing environmental significance is found in the March 4, 1972 treaty with Japan obligating the parties to take measures to "prevent damage to such birds and their environment." Such language bound the United States to enact environmental legislation, which obligation was only tangentially met by the very narrow 1974 amendment to § 703; far more appropriately, it was met by the Federal Water Pollution Control Act of 1972 (33 U.S.C. § 1251 *et seq.*); the Federal Environmental Pesticide Control Act of 1972 (7 U.S.C. § 136 *et seq.*); and the Endangered Species Act of 1973 (16 U.S.C. § 1531 *et seq.*). Indeed, the last cited statute expressly references the pledges of the United States under the Migratory Bird Treaties with Canada, Mexico and Japan. 16 U.S.C. § 1531(4)(A) and (B).

The pervasive federal and state statutes and regulations affecting the environment need no broadening by attempts to stretch the Bird Act beyond its intended scope. Compliance

with environmental regulations entails huge expenditures of time and money by industry (203), and when there is adherence to these statutes there should be no back-door prosecutions based on strained interpretations of parochial criminal provisions. If there is a failure to adhere to pollution legislation, self-evidently, prosecution should be pursuant to the appropriate environmental statutes. These acts provide a limited but intended measure of protection for industry (e.g., the "best available technology economically achievable" standard in § 301 of FWPCA, 33 U.S.C. § 1311) as well as severe civil and criminal penalties for environmental degradation.

The use by Congress of the language "by any means or in any manner" did not contemplate unanticipated or accidental killing of birds ancillary to otherwise lawful manufacturing activity. Similar language under the Eagle Act which existed prior to its 1972 amendment was construed by the Government as being inapplicable to eagle poisoning by farmers, as argued above. Moreover, the construction of that language by regulations issued under the Act, evidence the Government's area of concern. The pertinent regulations (50 C.F.R. § 20.21 *et seq.*) relate to the regulation of hunting practices and no other "means" or "manner" be it industrial, agricultural or otherwise.

Should the Court be unable to decide what Congress intended based upon the language Congress employed, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis vs. United States*, 401 U.S. 808, 812 (1971). In *United States vs. Bass*,⁷ 404 U.S. 336

⁷ In *Bass*, the statute under consideration (19 U.S.C. § 1202(a)) provided, in pertinent part, that:

"Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives,

(Footnote continued on following page)

(1971), the Supreme Court set a standard for the interpretation and application of a criminal statute where its terms were unclear (404 U.S. at 347-49):

"In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' *United States v. Universal C. I. T. Credit Corp.*, 344 US 218, 221-222, 97 L Ed 260, 264, 73 S Ct 227 (1952). This principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' *McBoyle v. United States*, 283 US 25, 27, 75 L Ed 816, 818, 51 S Ct 340 (1931) (Holmes, J.). See also *United States v. Cardiff*, 344 US 174, 97 L Ed 200, 73 S Ct 189 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. Here, we conclude that Congress has not 'plainly and unmistakably,' *United*

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possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both."

The question presented was whether or not a felon could be convicted under this section for merely possessing a firearm absent a showing of any connection with interstate commerce. The legislative history did not provide a definitive answer to this question.

States v. Gradwell, 243 US 476, 485, 61 L Ed 857, 864, 37 S Ct 407 (1917), made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce." (Emphasis added.)

Similarly, Congress has not "plainly and unambiguously made it criminal to accidentally kill migratory birds."

Aside from legislative intent, another criterion for determining that a statute creates a public welfare offense is the seriousness of the offense and the penalties to be imposed. *Morissette*, *supra*, 342 U.S. at 256. What makes this case difficult in this context is the definition of the crime charged. It is "petty" but the totality of the counts charged in the indictment is anything but petty. Judge Curtin recognized this in granting defendant's motion for a jury trial. He said (428 F. Supp. at 620):

"Although jail sentences may not be sought by the Government in this indictment, the defendant has been charged with a number of counts which, under the statute, could lead to a substantial monetary penalty in addition to the potential for prison sentence. The size of this penalty constitutes a serious offense which justifies jury consideration. The Government cannot characterize the offense as petty and a jury trial unwarranted while, at the same time, it seeks a substantial penalty against the defendant."

Had an individual been indicted with the corporation and had that individual been facing a potential 18-year term of imprisonment, there would be no doubt that he could defend based upon his moral blamelessness. It should be no different where the defendant is a corporation and cannot be imprisoned. If the Government should respond by urging that any prison term would have to run concurrently (as was done in four-count indictment in *Rogers vs. United States*, *supra*, 367

F.2d 998), then logically, a fine of the corporation should only be based upon the violation of one count. While it makes little practical difference in this case since the Court reached a similar result by imposing a total fine of \$500, it did refuse defendant's Request to Charge No. 5 (10-11) based upon a single course of conduct being the basis for a conviction on only one count. *United States vs. Universal C. I. T. Credit Corp.*, 344 U.S. 218 (1952). The result reached by the Court below leads, therefore, to the proposition that both cumulative penalties and consecutive sentences are appropriate where mass bird deaths occur even though they result from an accident and the carrying on of lawful activity.

Conclusion.

If Judge Curtin had charged the issue of intent as requested by defendant, the jury would have to have found that defendant had intended to commit the act which is prohibited by 16 U.S.C. § 703. If he had also charged that accident was a defense he would have emphasized the required intent to harm birds and eliminated the possibility of a conviction in the absence of some degree of moral culpability, whether it be characterized as *mens rea* or scienter. Instead, he charged specifically to the contrary. For these reasons, defendant's conviction should be reversed and the matter remanded for a new trial with appropriate instructions consistent with the above argument.

Respectfully submitted,
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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U.S.A.
vs
FMC Corporation
No. 77-1372

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

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I mailed copies of a printed Brief & App. in
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10 copies of Brief, 10 copies of Appendix to:
A Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies of Brief, 3 copies of Appendix to:
Edward J. Arcara, United States Attorney
Att: Kenneth A. Cohen, Assistant U.S. Attorney
502 U.S. Courthouse
Buffalo, New York 14202

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Phillips, Lytle, Hitchcock, Blaine & Huber, Att: Paul B. Zuydhoek, Esq.

3400 Marine Midland Center, Buffalo, New York 14203

Leslie R. Johnson

Sworn to before me this

6th day of October, 1977

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979